82-1339
No.

Office-Supreme Court, U.S.
FILED
FEB 10 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE and KATHLEEN FERRARO,

Petitioners,

—v.—

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, ELLA OWENS, CARRIE HOWARD, THELMA LATTA, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RICHARD C. CAHN
Special Counsel, Town of Huntington
CAHN WISHOD & WISHOD
of Counsel
Counsel for Petitioners
534 Broadhollow Road
Melville, N.Y. 11747
(516) 694-2300

February 8, 1983

Questions Presented

1. Do individual black citizens, a civil rights organization, and an organization dedicated to providing publicly subsidized housing for minorities and the poor, possess standing under Article III of the United States Constitution and the Fair Housing Act, 42 U.S.C. §3612 (1976), to challenge a municipality's entire zoning code as allegedly exclusionary where the specific project in which they are interested cannot be built by reason of the unavailability of public financial assistance?

2. Are the claims of civil rights plaintiffs immediate and ripe for determination, and, if so, should their claims be determined in the first instance in a federal court, notwithstanding principles of comity and federalism, where the principal relief sought is that petitioner be ordered to rezone for multi-family use a particular parcel of property, but no application for such relief was ever made to the municipal officials vested by New York law with the authority to grant zoning changes?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT

I. Summary of Reasons 10

II. The Second Circuit Decision Conflicts with this Court's Standing Rules 11

III. The Second Circuit's Decision Inappropriately Places the Federal Courts in the Zoning Business 17

CONCLUSION 21

APPENDIX
(Bound Separately)

Decision of the Second Circuit 1a

Decision of the District Court 10a

Judgment Upon Which Review Is Sought 26a

Constitutional, Statutory and Local Ordinance Provisions. 30a

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. Const. art. III, §2 ..... 12, 16

U.S. Const. amend. XIV, §1 2

UNITED STATES STATUTES

28 U.S.C. §1254(1) (1976) 1

42 U.S.C. §1426b (Sup. IV 1980) 4

42 U.S.C. §1437f (1976 & Supp. IV 1980), *as amended by* Act of Aug. 13, 1981, Pub.L. No. 97-35 ..... 2, 3

42 U.S.C. §1439 (1976 & Supp. IV, 1980), *as amended* by Act of Aug. 13, 1981, Pub.L. No. 97-35 ..... 2, 8

42 U.S.C. §1981 (1976) 2

42 U.S.C. §1982 (1976) 2

42 U.S.C. §1983 (1976) 2

42 U.S.C. §§3601-3631 (1976) 2, 4

42 U.S.C. §3604 (1976) 14

42 U.S.C. §3612 (1976) 1

42 U.S.C. §5304(c)(1) (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. No. 97-35 ..... 2, 8

FEDERAL RULES OF CIVIL PROCEDURE

Fed R. Civ. P. 12(b) 1

Fed. R. Civ. P. 56 2

NEW YORK STATUTES

N.Y. Town Law §261 (McKinney 1965) 2

N.Y. Town Law §264 (McKinney 1965 & Supp. 1982-1983) 6

N.Y. Town Law §265 (McKinney Supp. 1982-1983) 6, 20

N.Y. Town Law §272-a (McKinney 1965) 4, 7

LOCAL ORDINANCES

Code of the Town of Huntington §198-130 (1978).. 6

CASES CITED:

Acevedo v. *Nassau County*, 500 F.2d 1078 (2d Cir. 1974) 17

Agins v. *City of Tiburon*, 447 U.S. 255 (1980) 7

Anti-Fascist Committee v. *McGrath*, 341 U.S. 123 (1951) (Frankfurther, J. concurring) 16, 19

Baker v. *Carr*, 369 U.S. 186 (1962) 20

Berenson v. *Town of New Castle*, 38 N.Y.S.2d 102, 341 N.E. 2d 236, 378 N.Y.S.2d 672 (1975) 11

City of Hartford v. *Town of Glastonbury*, 561 F.2d 1048 (2d Cir. 1977) (*en banc*), *cert. den.*, 434 U.S. 1034 (1978) 6

Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926) 17

Gladstone Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 5, 12

Glover River Org. v. *United States Department of Interior*, 675 F.2d 251 (10th Cir. 1982) 12

Havens Realty Corp. v. *Coleman*, 102 S.Ct. 1114 (1982) 12, 13, 14

Kennedy Park Homes Association, Inc. v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. den.*, 401 U.S. 1010 (1971) 19

Metropolitan Housing Development Corp. v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (on remand) 4, 17

Randolf v. *Town of Brookhaven*, 37 N.Y.2d 544, 337 N.E. 2d 763, 375 N.Y.S. 2d 315 (1975) 18

Schlesinger v. *Reservist Committee to Stop the War*, 418 U.S. 208 (1974) 16, 21

Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 13

Southern Burlington County NAACP v. *Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) 11

United States v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) 20

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 11, 13, 14, 16, 18, 19

Village of Belle Terre v. *Boraas*, 416 U.S. 1 (1974).... 17

Warth v. *Seldin*, 422 U.S. 490 (1975).... 11, 12, 13, 20, 21

ARTICLES:

Sager, *Insular Minorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 92 Harv.L.Rev. 1373 (1978) 14

Schwem, *Standing to Sue in Fair Housing Cases*, 41 Ohio St.L.J. 1, 25-61 (1980) 14

Jersey Ruling Aids Housing For Poor, New York Times, Jan. 21, 1983, at 1, col. 1 11

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, The Town of Huntington, New York, Kenneth C. Butterfield, Kenneth Deegan, Edward Thompson, Joseph Clemente and Kathleen Ferraro pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this action, which were filed on the 28th day of September, 1982.

Opinions Below

The judgment and opinion of the Court of Appeals, reported at 689 F.2d 391 (2d Cir. 1982), appear at Appendix pages 1a to 9a and 26a to 27a. The opinion of the district court (Constantino, J.) reported at 530 F. Supp. 838 (E.D.N.Y. 1982) appears at pages 10a to 25a in the Appendix.

Jurisdiction

The jurisdiction of the district court was based upon 28 U.S.C. §§1331, 1343(3) and (4), 1361, 2202, and 42 U.S.C. §3612 (1976).

The judgment of the Court of Appeals was filed September 28, 1982. A timely petition for rehearing en banc was denied by order filed November 12, 1982, which appears in the Appendix at pages 28a to 29a. This petition for certiorari is filed within ninety (90) days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

Statement of the Case

The United States Court of Appeals for the Second Circuit reinstated, after a district court dismissal under F.R.C.P. 12(b)

and 56 for lack of standing, the first and fourth causes of action of a complaint by the Huntington Branch of the NAACP, Housing Help, Inc., and six individuals, charging the Town of Huntington, New York, and its Supervisor and Town Board members,[1] with "interference" with a proposed housing project in violation of the Fair Housing Act, 42 U.S.C. §§3601-3631 (1976); 42 U.S.C. §§1981, 1982 and 1983 (1976); and the Fourteenth Amendment to the United States Constitution.[2]

Respondent Housing Help assertedly possesses an option to purchase a 14.6-acre parcel of real property located in Huntington, and respondents claim that the petitioners' actions prevented development there of a 162-unit apartment project ("Matinecock Court"), which would have otherwise received federal financial

---

[1]Petitioner Butterfield was and is Town Supervisor, and hence occupies an executive position, but pursuant to New York Town Law, §§29 and 52, he also performs legislative functions as a member of the Town Board. Zoning power is vested in the Town Board, New York Town Law §261 (McKinney 1965). After the determination in district court, an original defendant, Claire Kroft, was defeated for reelection and replaced by petitioner Ferraro.

[2]A second cause of action challenged on racial concentration grounds qualified approval by the United States Department of Housing & Urban Development ("HUD") of a pending, and since withdrawn, application by the Town for funds under Section 8 of Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, 42 U.S.C. §1427f (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub. L. No. 97-35 ("Section 8"), for a 150-unit low-income project, to be built by the Town itself within its Urban Renewal Area. A third cause of action challenged HUD's approval of the Town's 1979-82 Housing Assistance Plan ("HAP"), which had been submitted pursuant to 42 U.S.C. §§1437, 1439; 42 U.S.C. §§5304; and 24 C.F.R. §570.306(b)(3)(i), on the ground that the stated goal of zero new construction housing units contributed to and perpetuated racial segregation. The second and third causes of action were dismissed, and no appeal was taken by respondents. The Town withdrew the 150-unit urban renewal project, rendering the second cause of action moot. The third cause of action was dismissed because of the unavailability of Section 8 funds; however, HUD stated that it would require the Town to revise its housing unit goal to 100 if such funds become available, and Judge Costantino granted leave to respondents to reinstate the action against HUD in that event.

assistance under Section 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, 42 U.S.C. §1437f (1976 and Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. No. 97-35 ("Section 8").

The first cause of action alleged that petitioners unlawfully (1) "restrict[ed] private construction of multi-family housing units . . . to the Town's Urban renewal area", (2) "refus[ed] to take any action to afford multi-family housing status to the Matinecock Court site", and (3) "oppos[ed] respondents' application to HUD for Section 8 assistance for Matinecock Court."

The fourth cause of action is a pendent state action.

Analysis of the three federal claims follows:

1. Restriction of Private Construction of Multi-Family Housing Units to the Urban Renewal Area.

The Huntington Zoning Code does, in effect, restrict private construction of multi-family units to the Town's urban renewal area.[8] Despite the fact that the Huntington Housing Authority

[8]The Town of Huntington Housing Authority was created in 1960 by an act of the New York State Legislature (Laws of New York 1960, c.417), and upon its creation, the Town could and did create an urban renewal area, and subsequently applied for federal funds from the Urban Renewal Administration. The Housing Authority is authorized to manage and administer public housing programs under various federal and state laws, including construction and rehabilitation of housing units and family subsidy programs, 42 U.S.C. §1437f (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. 97-35. The Huntington Urban Renewal Agency was created by Laws of New York 1967, c. 222; it was authorized by the State Legislature to carry out the purposes of the State's urban renewal law, Laws of 1961, c. 402, codified at New York General Municipal Law §500-524 (McKinney 1974 & Supp. 1982-1983). In 1977 (Laws of New York 1977, c. 573), the name of the latter agency was changed to the Huntington Community Development Agency and it was authorized to apply for funds under the Housing and Community Development

(Footnote continued on following page)

is authorized to construct low income housing anywhere in the Town, respondents claim Huntington violated the Fair Housing Act, 42 U.S.C. §§3601-3631 (1976), by reason of its restriction of *privately* constructed multi-family housing. In the courts below, petitioners asserted that there can be no Fair Housing Act violation where a municipality has, as the Town of Huntington has, provided available areas for multi-family housing and acted affirmatively to promote low income housing.[4]

Petitioners argued below that despite respondents' assertedly possessing an option upon real property outside of the urban renewal area, their standing to challenge this policy depended

---

(Footnote continued from previous page)

Act of 1974, for the construction of new low income housing units and substantial rehabilitation of existing housing units. The Town adopted its first zoning ordinance in 1934. In 1965, the Town's Planning Board, pursuant to state legislative authorization contained in New York Town Law §272-a (McKinney 1965) adopted a comprehensive master plan for the development of the entire area of the Town. New York General Municipal Law §503 (McKinney 1974) requires the Town's Master Plan and Urban Renewal Plan to conform to one another; and Huntington fully complies with this requirement. From 1960 to 1964, there was no provision in the Zoning Code for multiple dwellings. On March 4, 1964, the Town amended its Code and created a Public Housing District, and the land upon which Gateway Gardens, the first public housing in Suffolk County, was shortly to be constructed, was placed in the new zone. The R-3M District, adopted June 3, 1969, provided for multiple dwellings in urban renewal areas, or, if owned by the Housing Authority, within or without such an area; and in 1969 the Public Housing District merged with and became part of the R-3M District. During the period 1950 to 1970, the Town's population grew from 47,506 to 200,172. Over the next decade, however, the population barely changed, the 1980 federal census showing 201,512 persons.

[4]*See Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (on remand). Respondents' allegations that they are injured because the available sites for multi-family housing are assertedly in areas of minority concentration cannot stand in light of Section 216 of the Housing and Community Act of 1980, 42 U.S.C. §1436-b (Supp. IV 1980) where Congress directed HUD "not to exclude a project for funding solely because its site is located in an area of minority concentration." It is evident that the Fair Housing Act was not intended to support this claim.

upon a showing that it constituted a barrier to actual construction on that property of a low income housing project.

The record, however, shows that "none of the plaintiffs have the financial capability to construct the Matinecock Court project without federal financial assistance", and that no such assistance is now, or soon likely to be, available. Far from controverting these facts, respondents affirmatively alleged that,

> "the housing needs of low income and minority citizens seeking decent affordable housing in Huntington, can, for the most part, only be met through the provision of housing units in a multi-family context and with use of state and/or federal subsidy program funding",

and submitted no evidence that federal or state funding would at any time become available for the purpose of constructing Matinecock Court. The HUD affidavits flatly stated that there is no likelihood of any new Section 8 construction funding for the Town of Huntington. HUD Area Manager Weiner stated that all such new construction funding was eliminated for fiscal year 1981 and no proposals would receive funds. HUD also stated, without contradiction, that no Section 8 funds had been made available to the New York area for fiscal 1982.

The Second Circuit appeared to recognize that the question was whether plaintiffs' injuries were "likely to be redressed if the requested relief is granted", 689 F.2d at 394, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979), but interpreted *Gladstone* as requiring merely that the relief sought "be reasonably designed to improve the opportunities of a plaintiff" (*id.*). The Court concluded,

> "In this case, we cannot exclude the possibility of Section 8 monies being available for Matinecock. Section 8 has not been eliminated and the availability of Section 8 monies in subsequent years is thus uncertain. Unlike *City of Hartford*

v. [*Town of Glastonbury*, 561 F.2d 1048 (2d Cir. 1977) (*en banc*), *rev'g.* 561 F.2d 1032 (2d Cir. 1976), *cert. den.*, 434 U.S. 1034 (1978)], therefore, the relief sought here may benefit the plaintiffs." 689 F.2d at 395.

2. Refusal to Take any Action to Afford Multi-Family Housing Status to Matinecock Court.

On February 22, 1980, representatives of respondent Housing Help met casually and informally with four members of the Town Board, but not with Supervisor Butterfield, "to advise Huntington officials of the Matinecock project . . . and to request that the Town Board act to permit multi-family residential zoning for this development" and to permit "multi-family residential construction by private developers outside of the urban renewal area and throughout the Town". (Complaint, ¶42).

In treating the February 22nd meeting, the Second Circuit merely recited respondents' informal zoning request, noted that it had been referred to the Town's Planning Department for study, and that the Town planning board had not yet reported the results of its study. 689 F.2d at 392.

New York Town Law §§264 and 265 (McKinney 1965 & Supp. 1982-1983), however, direct town boards to adopt procedures for rezoning applications, which in Huntington must be in writing accompanied by supporting documentation. (Code of the Town of Huntington, 1978, §198-130).

The record is undisputed that no application for a change of zone for the Matinecock site has even been made.[5]

---

[5]Respondents excused their failure to apply for rezoning by stating that the Town Board "cannot grant a multi-family use on the site without first generally amending the Town's zoning ordinance to permit multi-family residential construction by private developers outside of the urban renewal section of Huntington and throughout the Town". To the

(Footnote continued on following page)

Moreover, New York Town Law §272-a (McKinney 1965) vests the planning board with jurisdiction over changes in a town's comprehensive master plan, which would be required, were the Town to accede to respondents' request to permit private multi-family construction "throughout the Town". Thus, referral of respondents' informal request to the planning board was in accordance with usual procedures. Respondents did not await the completion of the study before filing this action.

The Second Circuit appeared to treat petitioner's failure to promptly schedule a hearing upon the basis of respondents' oral and informal request, and thereafter to grant a rezoning, as tantamount to a denial of a formal application for multiple housing zoning on the option site, entitling respondents to a trial on the question as to whether that denial was racially motivated.

Petitioners argued below that respondents' failure to make formal application for a zoning change (which, carefully and properly documented, could be acted upon through the usual zoning procedures under New York law) rendered the action premature and nonjusticiable, relying in part upon *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980), in which this Court found "no concrete controversy" regarding the application of municipal zoning requirements, because "appellants have not submitted a plan for development of their property" under the ordinance.

Petitioners also argued that it was inappropriate for zoning applications to be determined in the first instance in federal court.

Footnote continued from previous page)

contrary, respondents have always been free to formally request that multi-family zoning be created for their property and grant of that application would itself effect a change in the Zoning Code and Map. New York Town Law §265 (McKinney 1965 & Supp. 1982-1983). A recent unpublished opinion of the New York Supreme Court, Suffolk County, (*Suffolk Housing Services, et al.* v. *The Town of Brookhaven, et al.*, Index No. 75-20017, made it clear that most communities do not zone vacant land for multi-family purposes independently of specific applications by landowners (*Suffolk Housing Services*, Slip Op. at p. 15).

The district court, having dismissed the action by reason of the unavailability of funds with which to build the project, did not reach these issues. The Court of Appeals did not address the latter issue.

3. Opposing Respondents' Application To HUD For Section 8 Assistance For Matinecock Court.

Respondents' third claim is based upon Supervisor Butterfield's October 14, 1980 letter to HUD advising that the Town opposed approval of the Matinecock Court project and recommending that HUD disapprove it.

Respondents alleged that on July 29, 1980, HUD's Deputy Area Director invited Housing Help to file an application for a Section 8 1980-81 funding allocation for Matinecock Court. Within 30 days, Housing Help and another organization, National Housing Partnership, filed a joint application for such funding.

Pursuant to Section 213 of the Housing and Community Act of 1974, 42 U.S.C. §1439 (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. 97-35, the views of the local government must be sought on the question of whether the Section 8 proposal is consistent with the municipality's HAP.[6] This procedure was followed in this case, and on October 14, 1980, Supervisor Butterfield wrote to HUD, advising HUD truthfully that the Housing Help application was inconsistent with Huntington's HAP, which contained zero new construction units as a goal. He also correctly advised that the project could not be

---

[6]The Town applied for federal funds for community development block grant ("CDBG") programs for program years commencing in 1975 through 1982. Approval of a municipality's HAP is a prerequisite to receipt of funds under the Community Development Act of 1974, 42 U.S.C. §5304(c)(1) (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. 97-35. HUD approved all HAP's submitted by the Town during that period of time pursuant to 42 U.S.C. §§1437, 1439; 42 U.S.C. §§5304(c)(1); and 24 C.F.R. §570.306(c)(3)(i).

carried out within the existing single family R-40 (1-acre) zoning.

Notwithstanding the Supervisor's comments, HUD ranked the Matinecock Court project in a four-way tie for sixth place, among the 16 proposals concurrently competing for Section 8 funds in Suffolk County.[7] Neither the inconsistency with the HAP nor the incompatibility with the Town's zoning deterred HUD from giving the proposal what the Second Circuit termed "a relatively favorable response", 689 F.2d at 394-395.

Moreover, HUD's Acting Area Manager Myerson stated that, "should Section 8 New Construction funds become available to the New York Area Office in the future, and should some portion of these funds be made available to Suffolk County, then Matinecock Court's previous ranking (of sixth place) will still not prevent it from receiving these 'hypothetical' Section 8 funds". She further stated that at that future date, Matinecock Court could be reactivated and "evaluated anew" in light of HUD's then current criteria, so that it could conceivably be "ranked as highly as first" among the Suffolk County proposals then under consideration.

The record reflects that the Butterfield letter had no effect whatsoever upon the failure of the Matinecock Court Project to receive funding. In the Area Manager's words, "none of [the sixteen competing Suffolk County projects] were funded since the expected fiscal year 1981 funds never materialized—to be sure, the type of Section 8 funding for which these projects competed has been eliminated."

---

[7]The Second Circuit mistakenly attributed sponsorship of another of the sixth place finishers, Huntington Park, to the Town of Huntington, 689 F.2d at 393. Huntington Park was a privately sponsored proposal. The error probably derives from HUD Area Director Weiner's June 19, 1981 affidavit, in which he states that "The only other project from the Town of Huntington which was submitted in response to the June, 1980 NOFA was a proposal entitled 'Huntington Park'." The meaning would have been clearer if the words "proposed to be built in" were substituted for the word "from".

Nor did the Town's HAP, containing a zero new rental units goal, referred to in Supervisor Butterfield's letter, prevent funding of the project: Ms. Myerson stated that, "should sufficient HUD new construction rental funds become available for use in Suffolk County during fiscal year 1982, *then HUD will require Huntington to amend its HAP* [to provide for a goal of 100 units of new or substantially rehabilitated rental housing]." (emphasis in original).

The courts below did not address the question as to whether the Town's "opposition" to the Matinecock Court proposal, as evidenced by the Butterfield letter,[8] stated facts upon which relief could be granted.

REASONS FOR GRANTING THE WRIT

I.

Summary of Reasons

There are more than 82,000 local governmental units in the nation, many of which have adopted zoning codes.[9] In recent years these codes have often been challenged as exclusionary. This case presents important questions as to the proper role of the federal courts in the determination of such challenges. The decision of the Second Circuit, if followed in other circuits, under-

---

[8]Even a broad reading of Complaint ¶19 which, in connection with the class action allegations, poses the question "whether Huntington's interference with the construction of Matinecock Court project" was unlawful, does not provide support for the ruling below. If the "interference" is claimed to have been the Town's short-lived submission of a 150-unit low income project, (HUD's pre-approval of which was challenged in the now-dismissed second cause of action), HUD's representatives made it clear that the Town's project and Matinecock Court did not compete for the same funds, and the submission by the Town of its 150-unit proposal was in no manner responsible for the failure of Matinecock Court to receive funding.

[9]In New York State, 1,038 of 1,546 local governments have enacted zoning ordinances.

cuts the standing rules established by this Court in *Warth* v. *Seldin*, 422 U.S. 490 (1975) and *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and, in particular, the requirements that plaintiff (1) allege a distinct and palpable injury to himself, and (2) demonstrate that he personally would benefit in a tangible way from the court's intervention. The ripeness issue concerns whether a plaintiff can bring an action against a government body without affording that body an opportunity to act, in a discriminatory manner or otherwise, as to the relief the plaintiff seeks. This case also presents in appropriate form the question as to whether application for rezoning of a specific parcel of property should, under principles of comity and federalism, properly be heard in the first instance in the federal courts, or whether zoning determinations, "peculiarly within the province of state and local legislative authorities," *Warth* v. *Seldin*, 422 U.S. at 508, n. 18, should first be made elsewhere.

This case also raises the question whether there is any public policy reason to prefer that the federal courts hear such controversies, in light of the apparent willingness of the state courts to decide these questions, which they are free to do without the inhibitions of Article III. *Berenson* v. *Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), *Southern Burlington County NAACP* v. *Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); *Jersey Ruling Aids Housing For Poor*, New York Times, January 21, 1983, at 1, col. 1.

II.

The Second Circuit decision conflicts with this Court's standing rules.

A. "Distinct and Palpable Injury".

Despite HUD's statements that all new construction Section 8 funding had been eliminated for fiscal 1981, and that none had

been made available to the New York Area for fiscal 1982 (HUD Statement of Undisputed Facts Pursuant to Local Rule 9(g), ¶6), and respondents' admission that "none of the plaintiffs have the financial capability to construct the Matinecock Court project without federal financial assistance", the Second Circuit refused to "exclude the possibility of Section 8 monies being available for Matinecock." 689 F.2d at 395.

This holding erroneously failed to take respondents' admissions into account. *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, n.22 (1979); *Glover River Org.* v. *United States Department of Interior*, 675 F.2d 251, 254, n.3 (10th Cir. 1982) and was based only upon speculation. Moreover, treating the allegations of the complaint as true for purposes of a dismissal motion based upon standing (which was improper in the face of petitioners' request for Rule 56 relief and in light of both lower courts' actual consideration of evidence outside of the pleadings) only highlights the respondents' position that, in the absence of Section 8 funds, the Matinecock Court Project could not be built. The focus of the entire complaint, including the dismissed second and third causes of actions, was upon petitioners' (and HUD's) alleged interference with respondents' quest for Section 8 funds. The complaint freely concedes the respondents' dependence upon federal subsidies for the construction of their project. Complaint ¶¶15, 27.

More critical here, however, is the fact that the Second Circuit's formulation of the issue, if followed in other Circuits, will permit plaintiffs to prosecute actions without any demonstration whatever that they will suffer "distinct and palpable injury" at the hands of the defendant,[10] which showing has repeatedly been termed one of the "Article III minima", whether or not the action is brought under the Fair Housing Act. *Warth* v. *Seldin*, 422 U.S. at 501; *Gladstone Realtors* v. *Village of Bellwood*, 441

[10]Or that they "were genuinely injured", *Havens Realty Corp.* v. *Coleman, supra*, 102 S.Ct. at 1123 n.16.

U.S. at 100; *Havens Realty Corp.* v. *Coleman*, 102 S. Ct. 1114, 1123 (1982). Like the plaintiffs in *Warth*, the respondents here "rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [petitioners] acted otherwise, and might improve were the Court to afford relief". *Warth* v. *Seldin, supra*, 422 U.S. at 507.

Respondents did not, and could not, demonstrate that their alleged injury is "fairly traceable to the [petitioner's] acts or omissions." *Village of Arlington Heights* v. *Metropolitan Housing Development Authority, supra*, 429 U.S. at 261; *Simon* v. *Eastern Ky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The record clearly shows that total failure of funding, and not petitioner's zoning policies, was solely responsible for respondents' inability to construct Matinecock Court.[11] This case presents for decision the question reserved by the Court in *Arlington Heights*, 429 U.S. at 261, n.7, whether "termination of all available assistance programs would preclude standing".

In an era of declining governmental support for entitlement programs, it is of importance that the question be answered by the Court. We further suggest that this question must be answered in the affirmative; otherwise, there would exist no rationale for the *Arlington Heights* exception to the *Warth* rule: that a

[11]Even if one accepts respondents' undocumented claims that their future chances of receiving Section 8 funds for Matinecock will be "substantially reduced" by the lack of appropriate zoning, and that their proposal was already downgraded by HUD pursuant to 24 C.F.R. §880.306 (b)(iv), which makes "permissiveness of current zoning" a selection factor, they do not possess standing to challenge either the zoning or HUD's ranking procedures in the absence of available funds which would at least breathe potential life into their project. In failing to appeal from the dismissal of the second and third causes of action, on the grounds that HUD had committed itself to compel the Town to amend its HAP, and would re-rank all proposals, including Matinecock Court, when and if funding became available respondents recognized that their claims against HUD were not viable at this time, but could be revived at any future time funds became available. It is difficult to understand how the claims against the Town possess greater viability at this time than these now-abandoned claims against HUD.

plaintiff's Fair Housing Act claim "focus on a particular project" which is "not dependent on speculation about the possible actions of third parties not before the court", in contrast to being but a "generalized grievance", *Village of Arlington Heights* v. *Metropolitan Housing Development Authority, supra,* 429 U.S. at 264. It seems clear that the Court had in mind a viable, and not a hypothetical, housing project: otherwise there would be no way for a plaintiff to show " 'an actionable causal relationship' between [a municipality's] zoning practices and his asserted injury."[12]

B. "Tangibly Benefit From the Court's Intervention".

The district court's finding that "there are no Section 8 new construction . . . funds now available" was affirmed by the Second Circuit, 689 F.2d at 395. The district court's further finding

[12]The Court's "specific project" exception has been criticized by the commentators because it "fails to take into account the . . . substantial possibility that none of the named plaintiffs would actually be afforded residence in the project once it was built". Sager, *Insular Majorities Unabated*: Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 Harv. L.Rev. 1373, 1387-88 (1978); Schwem, *Standing to Sue in Fair Housing Cases,* 41 Ohio St.L.J. 1, 25-61 (1980). The Second Circuit has apparently adopted Professor Sager's suggestion that the "specific project" exception came about because this Court perceived "that the claim of right by the individual plaintiffs [in *Arlington Heights*] was a claim to an intermediate state of affairs, the existence of which favored their chances for the ultimate benefit of improved housing for themselves". Sager, *op cit. supra,* at 1387-88. If that was indeed the Court's perception, reiteration in *Arlington Heights* of *Warth's* "substantial probability" of the project's "materializing" language, neither adequately communicates such perception nor squares with the test requiring "direct and palpable injuries that are 'fairly traceable' to petitioner's actions," *Havens Realty Corp.* v. *Coleman, supra,* 102 S.Ct. at 1122. The Fair Housing Act prohibitions themselves focus upon discriminatory acts with regards to "a dwelling", 42 U.S.C. §3604(a). The specific project requirement thus relates to the *actual* realities of a project, including the area of its probable and immediate impact, and is not some formalistic, hypothetical requirement, which simply provides a rationale for finding standing in a sympathetic plaintiff to make any claim he may desire within the parameters of the Fair Housing Act.

that "it is unlikely that any such subsidies will be available in the near future" was only addressed obliquely by the appeals panel, which held "we cannot exclude the possibility of Section 8 monies being available for Matinecock", 689 F.2d at 395.

On the basis of the latter statement, the Second Circuit sustained respondents' standing to challenge petitioners' zoning code, although it conceded that "those who have absolutely no realistic financing capability have no standing", 689 F.2d at 394. In light of the court's declination to "exclude the possibility" of financing, it found that the removal of the alleged zoning barrier "would benefit [respondents] in a tangible way from the court's intervention" because "all that is required is a showing that such relief be reasonably designed to improve the opportunities of the respondents" 689 F.2d at 394.

Having thus significantly diluted the *Warth* "substantial probability" test, the court explained why, in its view, respondents possessed standing thereunder:

> "Indeterminacy of financing alone, however, is not enough to dismiss such an action, since the multitude of factors affecting ultimate financing capability are too variable to permit certainty in prediction. The ebb and flow of the economy, long term interest rates, and the political environment all affect the existence and level of private and governmental funding. Moreover, the likelihood of Housing Help's securing financing is in part related to whether its proposal complies with local zoning ordinances. Private lenders as well as government agencies will be understandably reluctant to make sizable commitments of funds for projects which violate zoning laws and which, at best, cannot be started before years of litigation are completed. In such circumstances, dismissal of a complaint because of lack of committed financing may well prevent any litigant from challenging a zoning ordinance." 689 F.2d at 394.

The Second Circuit thus avoided any discussion of the key element of Arlington Heights, that there be a "substantial probability" that the ultimate relief sought will be gained by a plaintiff's success in court. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* 429 U.S. at 264. Here, the ultimate relief sought is housing. Despite the affirmed finding that there is no current financing available, and the demonstration in the record that future funding is highly unlikely,[13] and hence that there is currently almost no possibility that housing would result from this litigation, the court found standing. Article III would be meaningless if standing could thus be found upon the slightest possibility of some future benefit.

As a matter of policy, as well as precedent, and no matter how worthy the cause, a court should not exercise its extraordinary powers (particularly in a case in which it is called upon to perform a fundamental function of a local government legislative body) unless it is able to remove the final barrier to ultimate relief. *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 154-55 (1951) (Frankfurter, J. concurring). Since zoning challenges are among "the most important and delicate of [a court's] responsibilities," the courts should insure that "such adjudication does not take place unnecessarily"; *Schlesinger* v. *Reservist Committee to Stop the War,* 418 U.S. 208, 221 (1974).

---

[13]Interestingly, respondents made no effort to rebut the affidavits submitted by HUD on the future financing question, preferring to rest upon their "Catch 22" argument: that without zoning, they would not qualify for future Section 8 monies, and, to deny them standing to challenge the zoning because of the absence of financing would deprive them permanently of the opportunity to litigate. See footnote 11, *supra.* Even if this argument, adopted by the Second Circuit, 689 F.2d at 394, were valid, it would not justify an exception to the Article III requirement that there exist a "case or controversy". If low-income housing cannot be built without government subsidies, and such subsidies are not forthcoming, no practical relief would follow entry of a judgment for a plaintiff in a case such as this; indeed, harm might ensue, in that the municipality might be compelled to rezone a property for a use which could never be constructed, thus effectively sterilizing the property.

The legislative history of the Fair Housing Act makes it clear that the "ultimate relief" intended to be available under the Act was the "elimination of discrimination in the sale or rental of housing" (Remarks of Sen. Mondale, 114 Congressional Record, March 4, 1968, p. 4975), not to "magically solve all the housing problems" of Blacks (Remarks of Rep. Fascell, 114 Congressional Record, April 10, 1968, p. 9575). Whatever affirmative duty was created by the Fair Housing Act, *See Acevedo* v. *Nassau County*, 500 F.2d 1078 (2d Cir. 1974), does not exceed providing some available space for low-income housing. *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (on remand); *see* notes 4 and accompanying text, *supra*. The basic purpose of the legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it." (Remarks of Sen. Mondale, *supra*, February 20, 1968, p. 3421).

By no stretch of the imagination is a rental unit in a hypothetical low-income housing complex "offered to the public", when, by reason of lack of funds, it cannot be built.

III.

The Second Circuit's decision inappropriately places the federal courts in the zoning business.

Despite respondents' failure to apply for a rezoning of their option land, the Second Circuit permitted this action to proceed, with the ultimate objective of "ordering Huntington and its officials to grant . . . multi-family zoning and to permit construction of [the Matinecock] project." In so doing, the court ignored all of the case authority, and considerable accumulated wisdom, which dictate that the federal courts should stay out of the zoning business. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).

Under traditional legislation (and Huntington's is no exception), the body authorized to rezone land (the town board) is mandated to consider, at a public hearing, all of the local needs, and the public health, safety, morals and general welfare. The topics considered at such a hearing range from traffic congestion to sewage disposal, drainage, proximity to schools, topography, actual development of neighboring properties, dilution of property values, and aesthetics, to name only a sample, New York Town Law §261 (McKinney 1965). The property owner seeking a rezoning attempts to show the appropriateness of the rezoning; members of the public, including neighboring property owners, are also entitled to present evidence and comment on all of these matters of uniquely local concern. *Randolph* v. *Town of Brookhaven*, 37 N.Y.2d 544, 337 N.E.2d 763, 375 N.Y.S. 2d 315 (1975).

Since this action is based upon allegations that some act by the Town was discriminatory, it is an essential element of the cause of action that the Town be afforded an opportunity to act. Since there was never a zoning application, there was neither a public hearing nor a denial of the respondents' relief.

In *Arlington Heights*, the Court had before it for review lengthy proceedings before a Plan Commission and Village Board, which preceded a 6-1 denial of MHDC's rezoning application. The Court then attempted to determine "whether invidious discriminatory purpose was a motivating factor", which task, it was said, "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available". *Village of Arlington Heights* v. *Metropolitan Housing Development Authority, supra*, 429 U.S. at 266. Here, there was no such record upon which the action and intent of the Town can be evaluated.

Closer to the heart of the matter, however, is the undisputed fact that there never was a "refusal to rezone" whose motivation could be tested, because there was never an application which was susceptible of being refused. That being so, the matter is not ripe for determination at all, whether or not an adequate record exists. As Justice Frankfurter wrote:

> "Although a litigant is the person most directly affected by the challenged action of the Government, he may not have 'standing' to raise his objections in a court if the action has not, as it were, come to rest. Courts do not review issues, especially constitutional issues, until they have to. In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary."

Anti-Fascist Committee v. *McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J. concurring) (citations omitted). In a footnote, Justice Frankfurter explained:

> "Government action is 'final' in the sense here involved when at no future time will its impact on the petitioner became more conclusive, definite or substantial."

Id. at 154, n.4.

It is clear that there has been no "final" action taken by the Town against the respondents. Only a determination by the Town of a rezoning application would render the impact of Huntington's planning and zoning process on the respondents "conclusive, definite and substantial".

The failure of respondents to make proper application for a rezoning also handicapped the petitioners so as to make it impossible for them to weigh all of the considerations for and against the desired rezoning, on the basis of reliable information, marshalled by those persons, including respondents, who deem their individual interests to be most directly affected by the present or proposed zoning classification of the option property. In *Arlington Heights*, the Court remarked that "departures from normal procedural sequence . . . might afford evidence that improper purposes are playing a role", *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, *supra*, 429 U.S. at 267. See also, *Kennedy Park Homes Association, Inc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. den.*, 401

U.S. 1010 (1971) (sudden action to adopt moratorium on new subdivisions and to rezone plaintiff's land as open space, upon learning of plans for low-income housing project); *United States* v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) (incorporation drive begun within three weeks of issuance of a HUD feasibility letter for low-income housing; new city, upon its incorporation, adopts ordinance prohibiting multiple-family dwellings). In this case, petitioners have essentially been prejudiced by their careful adherence to the normal rezoning procedures.

In *Arlington Heights*, the Court noted that MHDC had "expended thousands of dollars on the plans and on the studies submitted to the Village in support of the petition for rezoning." *Ibid.*, 429 U.S. at 262.

This Court has termed zoning laws essential tools for "effective urban planning", *Warth* v. *Seldin, supra*, 422 U.S. 490, 508 n.18 (1975), "peculiarly within the province of state and local legislative authorities". *Id.* The "normal democratic process" therein referred to by Justice Powell was available to the respondents here, but was left unused. Justice Brennan, dissenting in *Warth*, also remarked that consideration of the merits of that case "could involve grave sociological and political ramifications". *Id.* at 520.

Basic political functions, such as the zoning of land, ought to be left to the politically responsive branches of government. Particularly is this so where state law and the Town's code provide for flexibility and creativity in the creation of zoning districts, in the rezoning of particular lands, and, where appropriate, in affording relief from the strict requirements of a zoning code. New York Town Law §265 (McKinney Supp. 1982-1983). The necessity to weigh competing social and political interests renders these issues nonjusticiable under Article III. *Baker* v. *Carr*, 369 U.S. 186 (1962).

Adjudication of these sensitive issues which can potentially invalidate Huntington's long-standing zoning plan should not

take place unless and until it is necessary. *Schlesinger* v. *Reservist Committee to Stop the War*, 418 U.S. 208, 221 (1974). The Second Circuit's decision thus departs from tradition, case authority, and good sense. Respondents have thus not alleged facts sufficient to make out a present case or controversy. *Warth* v. *Seldin, supra*, 422 U.S. at 516.

CONCLUSION

A writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit to review that court's decision and judgment dated September 28, 1982.

Dated, Melville New York
February 8, 1983

Respectfully submitted,

RICHARD C. CAHN
Special Counsel, Town of Huntington
CAHN WISHOD & WISHOD,
of Counsel
Counsel for Petitioners
534 Broadhollow Road
Melville, N.Y. 11747
(516) 694-2300